CRIMINALIZING POOR PARENTING SKILLS AS A MEANS TO CONTAIN VIOLENCE BY AND AGAINST CHILDREN

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Violence unfortunately has become commonplace in the lives of many youth in the United States. Not only do children[1] commit approximately fifteen percent of all violent crime,[2] they are also increasingly its victims.[3] While juvenile crime has frequently been analyzed apart from its adult counterpart, this distinction is rapidly losing significance. Juvenile crime today often is inextricably linked to illicit adult activity, especially the drug trade, and is no less sophisticated and deadly.[4] In cities such as Los Angeles and Detroit, special police task forces monitor juvenile gangs, which routinely rob and murder in defense of their organized crime operations. Violence from the streets has also infected the classroom. Due to fear of weapon-bearing adolescents, many schools have had to institute extraordinary measures to guarantee

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[1] For purposes of this Comment, "children" are persons under eighteen years of age.

[2] FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 174 (1987).

[3] The rate of victimization for teenagers is now higher than for adults. *See* C. WHITAKER, TEENAGE VICTIMS 1 (1986) (National Crime Survey Report NCJ-103138). Even if not directly affected by violence, young people today often suffer indirectly from the fear and intimidation of potential violence. A survey of Boys and Girls Clubs' members, aged 13-18, indicated that 77% lived in fear of family violence, while 68% worried about becoming the victim of violence. *See Teen Trials,* USA Today, Sept. 13, 1990, at D1, col. 1.

[4] *See* Toufexis, *Our Violent Kids,* TIME, June 12, 1989, at 52, 52 (describing increases in murder, aggravated assault, and rape committed by juveniles); Applebome, *Juvenile Crime: The Offenders are Younger and the Offenses More Serious,* N.Y. Times, Feb. 3, 1987, at A16, col. 1; *see also* Canellos, *Killings By Young Believed on Rise; Noted Psychologist Foresees "Epidemic,"* Boston Globe, Aug. 13, 1990, at 17, col. 6 (predicting a fourfold increase within 10 years in the number of murders committed by juveniles); Blau & Recktenwald, *Child Homicides Soar in City and Suburbs,* Chicago Tribune, May 20, 1990, at C1, col. 2 (describing a dramatic increase in juvenile homicides); Wright, *Robbery by Youths on Rise in City,* Newsday, Jan. 31, 1990, at 5, col. 1 (noting a 400% increase in robbery convictions between 1986 and 1989 by groups of four or more youths).

the security of students and teachers.[5] In the home as well, children find little peace: over two million children in the United States are reported to be abused annually.[6] Studies show that children who face abuse in the home are more likely to engage in crimes against people in later years as violence begets violence.[7]

Frustrated with these seemingly intractable problems, lawmakers in many localities have begun to reevaluate the inadequacies of previous approaches to juvenile delinquency and child abuse. While most past efforts to curb juvenile violence have focused on providing positive reinforcement or punishment directly to the child, there is a growing trend toward holding parents criminally liable for failing to supervise their children adequately when they commit antisocial acts.[8] Parents who fail to protect their children from violence similarly are facing harsher laws and sanctions from the courts.[9]

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[5] *See* Davis, *Plans Told for Security in Schools,* Chicago Tribune, July 19, 1990, at 2, col. 1; *For the Record,* Washington Post, July 17, 1990, at A18, col. 5.

[6] *See* Cimons, *Panel Calls Child Abuse A National Emergency,* L.A. Times, June 27, 1990, at A12, col. 1; *Reports of Child Abuse, Neglect Up 9% In 1989,* Chicago Tribune, Apr. 3, 1990, at 12; *see also* Manning & Peterson, *Child Abuse's Alarming Rise,* USA Today, March 6, 1989, at 1A, col. 3 (noting that the rate of child abuse reports increased by 212% between 1976 and 1986).

[7] *See* W. THORNTON, L. VOIGT & W. DOERNER, DELINQUENCY AND JUSTICE 207 (2d ed. 1987); *see also* Toufexis, *supra* note 4, at 54 (noting the relationship between children who are abused and those who commit violent crimes). *See generally* Ferro, *Foreward,* in EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY (R. Hunner & Y. Walker eds. 1981) (noting the complex nature of relationship between abuse and delinquency). *But see* Widom, *Does Violence Beget Violence? A Critical Examination of the Literature,* 106 PSYCHOLOGICAL BULL. 3, 23 (1989) (arguing that knowledge of the long term consequences of abusive home environments is limited).

[8] *See* Shapiro, *When Parents Pay for Their Kids' Sins,* U.S. NEWS & WORLD REP., July 24, 1989, at 26.

[9] *See, e.g.,* State v. Deskins, 152 Ariz. 209, 210, 731 P.2d 104, 106 (1987) (holding parents criminally liable for endangering health of their children); State v. Walden, 306 N.C. 466, 468, 293 S.E.2d 780, 782 (1982) (finding a mother criminally liable for failing to prevent an assault on her child); State v. Williquette, 129 Wis. 2d 239, 242-43, 385 N.W.2d 145, 147 (1986) (holding a mother criminally liable for failing to protect her two children from abuse by husband); N.M. STAT. ANN. § 30-6-1(C) (1978 & Supp. 1990) (including endangerment in the definition of child abuse). The Supreme Court of North Carolina, for example, has stated:

> Although our research has revealed no controlling case in this jurisdiction on the question of a parent's criminal liability for failure to act to save his or her child from harm, the trend of Anglo-American law has been toward enlarging the scope of criminal liability for failure to act in those situations in which the common law or statutes impose a responsibility for the safety and well-being of others.

Parents have a duty to care for their children, which includes an obligation to provide control and protection. According to leading criminal law experts:

> One may stand in such a personal relationship to another that he has an affirmative duty to control the latter's conduct in the interest of the public safety, so that omission to do so may give rise to criminal liability. A parent not only has a duty to act affirmatively to safeguard his children, but he also has a duty to safeguard third persons from his children . . . .[10]

Although parental responsibility laws[11] are not a recent phenomenon,[12] they gained new momentum in the 1980s. The California legislature's passage of such a law in 1988[13] refocused national media attention on the role of parents in juvenile delinquency and

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Walden, 306 N.C. at 473, 293 S.E.2d at 785.

For a discussion of child abuse laws in all 50 states, see Note, *Criminal Liability for Parents Who Fail to Protect*, 5 L. & INEQUALITY 359, 365-68 (1987). According to the Note's author:

> Many legislatures and courts are imposing a legal duty on parents to protect their children. Inherent in the right to raise children is the duty to support and protect them. Just as states will now punish professionals who fail in their professional duty to report suspected child abuse, there appears to be a growing willingness to punish parents who fail in their parental duty to protect their children. As the problem of child abuse continues to grow in this country, states are willing to take more drastic measures to stop harm to children.

Id. at 375.

[10] W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.3(6) (1986).

[11] As defined in this Comment, a parental responsibility law imposes an affirmative duty on the parent to supervise and/or protect the child in a manner consistent with societal expectations. A breach is an act of omission and is subject to criminal sanctions.

[12] These laws first gained notoriety in legal circles in the early 1970s. *See* Note, *A Constitutional Caveat on the Vicarious Liability of Parents*, 87 NOTRE DAME L. REV. 1321 (1972) [hereinafter Note, *Constitutional Caveat*] (questioning the effectiveness and constitutionality of parent liability statutes); Note, *Criminal Liability of Parents for Failure to Control Their Children*, 6 VAL. U.L. REV. 332 (1972) [hereinafter Note, *Criminal Liability*] (recommending that parental criminal liability be limited to comply with constitutional and criminal law); Note, *"Parental Responsibility" Ordinances–Is Criminalizing Parents When Children Commit Unlawful Acts a Solution to Juvenile Delinquency?*, 19 WAYNE L. REV. 1551 (1973) [hereinafter Note, *"Parental Responsibility" Ordinances*] (noting constitutional weaknesses and *ultra vires* problems with parental responsibility ordinances); *see also* Shong, *The Legal Responsibility of Parents for Their Children's Delinquency*, 6 FAM. L.Q. 145, 167-70 (1972) (describing a model parental responsibility statute); Annotation, *Criminal Responsibility of Parent for Act of Child*, 12 A.L.R.4TH 673, 677-78 (1982).

[13] *See infra* notes 29-33 and accompanying text.

on questions concerning the constitutionality of state intervention in the family.

While some commentators have found parental responsibility laws to be unconstitutional or without merit,[14] their analyses do not provide a framework to differentiate among the variety of laws that hold parents criminally liable for behavior that concerns their offspring. Parental responsibility statutes and ordinances need neither be unconstitutional per se, nor ineffectual. Provided that they accord with such basic notions as due process, they can pass constitutional muster. Unfortunately, many existing parental responsibility laws, including the California statute, do not meet fundamental constitutional standards or established principles of the criminal law.

Parents should not be subject to enactments that can be used to hold them criminally liable for their children's every transgression. Parental responsibility laws must be drafted to proscribe only those parental behaviors that can foreseeably lead to the child's delinquency or abuse; they should recite more than a requirement of guidance and include an objective of the parent's supervision that helps to identify those limited circumstances and settings where the parent can anticipate that liability will attach. In defining these objectives, lawmakers must realistically assess the bounds of parental authority. Assigning liability without regard to the parent's capacity to control or protect penalizes parents for parenthood.

This Comment explores the parameters of the parent's duty to supervise and protect the child and how legislatures and courts are redefining that responsibility in response to the tragedy of violence that is perpetrated by and against children. Part I describes the emergence of parental responsibility laws, juxtaposing the current trend of holding parents criminally liable for failure to supervise against the tradition of state deference to family autonomy. The prevalence of juvenile violent crime, child abuse, and the fear that they engender are the key variables that motivate the perceived need to hold parents more accountable for their children. Part II analyzes several legal hurdles that must be overcome before parental responsibility statutes and ordinances can pass constitutional muster; irrational presumptions, vagueness, and overinclusiveness have presented special problems for lawmakers in this context. Part

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[14] *See* Note, *Constitutional Caveat*, *supra* note 12, at 1334; Note, *Criminal Liability*, *supra* note 12, at 351-52; Note, *"Parental Responsibility" Ordinances*, *supra* note 12, at 1575-77.

III adds criminal law principles to the analysis. Since parental responsibility laws seek to punish passive conduct, they raise two issues in the criminal law: (1) meeting the unique requirements associated with criminal omissions, and (2) satisfying the element of criminal causation. Finally, Part IV introduces a model of parental control that will aid lawmakers in drafting legislation that will overcome the pitfall of punishing parents for parenthood rather than for unjustifiable failures in the supervision of their children.

I. THE EMERGENCE OF PARENTAL RESPONSIBILITY LAWS

A. *The Family's Unique Status in American Jurisprudence*

The family traditionally has occupied a unique position in American jurisprudence, as courts recognized that the family's autonomy and freedom from state interference were crucial to its own integrity and to the welfare of the nation.[15] The Constitution affords parents wide latitude in deciding how to raise their children,[16] an interpretation that has been reiterated in a host of Supreme Court decisions.[17] The due process[18] and equal protection[19] clauses of the fourteenth amendment, and the ninth amend-

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[15] The Supreme Court has stated: "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." Ginsberg v. New York, 390 U.S. 629, 639 (1968); *see also* W. GRUBB & M. LAZERSON, BROKEN PROMISES 45-46 (1982) (discussing decline of public responsibility for children during eighteenth and nineteenth centuries and ensuing enlargement of private responsibility for welfare of children); L. WARDLE, C. BLAKESLEY & J. PARKER, CONTEMPORARY FAMILY LAW §§ 1.08-1.09 (1988) (discussing courts' recognition of family autonomy and the right of parents to raise their children without state interference).

[16] The Supreme Court has indicated that a parent has a constitutional right to be free from "undue, adverse interference by the State." Bellotti v. Baird, 443 U.S. 622, 639 n.18 (1979).

[17] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 213-14 (1972) (holding that parents have a right to direct the upbringing of their children); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (holding that marriage and procreation are basic civil rights); Pierce v. Society of Sisters, 268 U.S. 510, 518 (1925) (stating that parents have a liberty interest in guiding their children's intellectual and religious development); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing the authority of parents to control their children's education).

[18] *See* Moore v. City of East Cleveland, 431 U.S. 494, 501-02 (1977); *Meyer*, 262 U.S. at 399. *See generally* Garvey, *Child, Parent, State, and the Due Process Clause: An Essay on the Supreme Court's Recent Work*, 51 S. CAL. L. REV. 769, 771 (1978) (arguing that the right of autonomy of both the child and the family are found in the family itself and not its individual members).

[19] *See* Caban v. Mohammed, 441 U.S. 380, 391 (1979); Stanley v. Illinois, 405 U.S. 645, 649 (1972).

ment[20] each provide the family unit with protection from unwarranted state intrusion.[21]

Parental responsibility statutes and ordinances significantly depart in at least three respects from the deference that legislatures and the courts traditionally have given to the family. First, they intrude on parental authority over child rearing. The courts have held consistently that the primary responsibility for child care rests with the parents themselves,[22] and, with the exception of abuse or severe neglect, they have been unwilling to scrutinize any particular style of parenting. Yet, parents whose manner of supervision is deemed lax now may be subject to criminal sanctions.[23] Second, parental responsibility laws represent a philosophical change in the state's approach to the family. Implicit in the reasoning underlying these laws is a rejection of the policy favoring the parents' judgment concerning the child's upbringing. The belief that the state is now more competent than the parent to define appropriate responses to a child's behavior is at odds with the view that a parent is best suited to carry out this task.[24] Finally, the imposition of criminal sanctions readily distinguishes these laws from most other regulations that are imposed on family relationships. Only in the most

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[20] *See* Griswold v. Connecticut, 381 U.S. 479, 487-99 (1965) (Goldberg, J., concurring).

[21] *See infra* notes 22-25 and accompanying text. As one commentator has noted:

> Maintaining the integrity of the family is not only a reflection of interests of the parents. It also mirrors a distinguishable, relational privacy interest, arguably rooted in first amendment associational values, the thrust of which is not merely to protect parental authority, but also to safeguard from state encroachment the intimacy and autonomy of the family relationship. Where, as in the contraceptive context, individual interests of parent and child are likely to collide, protection of their shared relational interest assumes independent importance and should not be directed at reinforcing the values of parents alone, which results when a parental consent requirement is imposed, but rather of fostering autonomous intrafamilial resolution of controversies.

Note, *Parental Consent Requirements and Privacy Rights of Minors: The Contraceptive Controversy*, 88 HARV. L. REV. 1001, 1017-18 (1975) [hereinafter Note, *Parental Consent Requirements*] (footnotes omitted).

[22] "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[23] According to Erwin Chemerinsky, a constitutional expert at the University of Southern California Law School, parental responsibility laws are "frightening," since they allow the state to "inquire into parenting through criminal liability." Armstrong, *Antigang Law Targets Parents*, Christian Science Monitor, May 9, 1989, at 8, col. 2.

[24] *See id.*

extreme cases has the state sought to criminalize behavior that involves interactions within the family.[25]

Parental responsibility laws, however, should not be evaluated with reference only to the integrity of the family unit. The state also has an interest in the rights of individual family members. For example, its authority to intervene in family affairs to protect children from parental abuse is well established.[26] Parents, however, are presumed in the first instance to possess the requisite skills to raise a child successfully. The Supreme Court has stated:

> Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course; our constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, asserted that parents generally "have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations." . . . Surely, this includes a "high duty" to recognize symptoms of illness and to seek and follow medical advice. The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.[27]

Parental responsibility statutes must thus be evaluated within the confines of the tension between the state's duty to respect the integrity of the family and its duty to protect children and the best interests of society. In effect, parental responsibility laws represent a legislative judgment that the state's interests transcend those of parent or family. The motivating factor leading to this conclusion in most circumstances is frustration with crime and violence involving the nation's youth.

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[25] This restraint is a consequence of the state's deference to family autonomy. *See supra* notes 15-24 and accompanying text.

[26] *See, e.g.*, L. WARDLE, C. BLAKESLEY & J. PARKER, *supra* note 15, § 1.09 (discussing state intervention in the family in light of tradition of deference to the family).

[27] Parham v. J.R., 442 U.S. 584, 602 (1979) (citations omitted).

B. *The Trend Toward Punishing Parents*

Given the deference that lawmakers and the courts typically have shown to parents in matters related to the family,[28] the impetus toward creating new duties for parents to follow in rearing their children, and then imposing criminal liability for any ensuing breach, seems remarkable. This trend raises the question of why the state now has decided to involve itself in a domain that has for so long been considered the exclusive province of the family. Recent scholarly advances defining what constitutes good parenting have not motivated this trend. Rather, these laws arise from frustration with two related problems: (1) the state's inability to contain juvenile lawlessness; and (2) the welfare of children who are victims of violence and abuse.

The parental responsibility law that has gained the greatest media attention to date was passed by the California legislature in 1988. In September of that year, California lawmakers amended section 272 of the California Penal Code as part of the Street Terrorism Enforcement and Protection Act (the STEP Act). The new amendment subjects parents to criminal prosecution for failing "to exercise reasonable care, supervision, protection, and control over their minor child[ren]."[29] As with many similar recent legislative acts across the country,[30] the California statute was passed in

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[28] *See supra* notes 15-25 and accompanying text.

[29] The California Penal Code now provides:

> Every person who commits any act or omits the performance of any duty, which act or omission causes or tends to cause or encourage any person under the age of 18 years to come within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code or which act or omission contributes thereto, or any person who, by any act or omission, or by threats, commands, or persuasion, induces or endeavors to induce any person under the age of 18 years or any ward or dependent child of the juvenile court to fail or refuse to conform to a lawful order of the juvenile court, or to do or to perform any act or to follow any course of conduct or to so live as would cause or manifestly tend to cause any such person to become or to remain a person within the provisions of Section 300, 601, or 602 of the Welfare and Institutions Code, is guilty of a misdemeanor . . . . *For purposes of this section, a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child.*

CAL. PENAL CODE § 272 (West Supp. 1991).

[30] *See* Shapiro, *supra* note 8, at 26; *see also Parents Face Charges for Children's Misdeeds*, UPI, Feb. 5, 1990 (LEXIS, Nexis library, UPI file) (describing Grand Rapids, Michigan police use of parental liability ordinance to curb escalating juvenile crime rate).

response to growing concerns with violent, juvenile crime.[31] California legislators were disturbed by escalating gang violence which accounted for hundreds of fatalities across the state every year. In 1987, the year prior to the STEP Act's passage, 387 people were killed on the streets of Los Angeles alone as a consequence of youth gang activity.[32] The new law also capitalized on the widespread sentiment that the parents of gang members were apathetic toward their children's illegal behavior.[33]

In addition to such legislative activity, the courts also have expanded the parental duty to protect the child, especially in circumstances involving abuse.[34] In *State v. Williquette*,[35] for example, the Wisconsin Supreme Court provided a novel interpretation to the state's child abuse statute and found that parents who fail to protect their children from abuse can be prosecuted for a felony. Although the language of the statute seems to prohibit only a parent's direct abuse of a minor,[36] the Wisconsin court held that a parent who knowingly permits another person to abuse his or her child subjects the youngster to abuse under the terms of the statute.[37] Certain authorities have criticized the court's expansive interpretation.[38] Like the motives underlying California's passage

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[31] *See* Armstrong, *supra* note 23, at 8.

[32] *See Organized Criminal Activity by Youth Gangs: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 59 (1988) (statement of Jerry Harper, Assistant Sheriff, Los Angeles County Sheriff's Dep't).

[33] *See id.* at 138 (statement of Benjamin J. Crouch, Bishop, Christ Memorial Church of God in Christ, Pacoima, CA) (describing juvenile crime as a result of parental neglect). This sentiment is by no means limited to California. *See, e.g.*, R. KRAMER, AT A TENDER AGE 270 (1988) (arguing that parents should be criminally liable when their children break the law); Gibson, *Make Parents Pay for Actions of Kids*, USA Today, Dec. 19, 1989, at 10A (extolling the virtues of Dermott, Arkansas' new parental liability ordinance).

[34] *See generally* Note, *supra* note 9, at 359 (noting increase in laws imposing criminal liability for failure to protect children from harm).

[35] 129 Wis. 2d 239, 385 N.W.2d 145 (1986).

[36] The Wisconsin statute provided:

> Whoever tortures a child or subjects a child to cruel maltreatment, including, but not limited, to severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm under s. 939.22(14) is guilty of a Class E felony. In this section, "child" means a person under 16 years of age.

WIS. STAT. ANN. § 940.201 (West 1982).

[37] *See Williquette*, 129 Wis. 2d at 249, 385 N.W.2d at 155.

[38] *See, e.g.*, Note, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children from Abuse*, 1987 WIS. L. REV. 659 (1987) (arguing that the Wisconsin Supreme Court reached a result that exceeded the purpose envisioned by the Wisconsin legislature).

of the STEP Act, practical concerns about child welfare were an important consideration for the *Williquette* court as it looked to broad notions of public policy to defend its decision.[39] In response to *Williquette*, the Wisconsin legislature later rewrote its child abuse law codifying those sections that held the parent criminally liable for failing to protect the child from abuse.[40]

Even though the trend toward criminalizing poor parenting skills may be motivated by noble goals such as reducing juvenile crime and protecting the welfare of children, the laws themselves must still function within limits established by the Constitution. The complex nature of the behavior that the state seeks to regulate in this instance has made it difficult for lawmakers to define precisely what conduct is proscribed, leaving the regulations susceptible to attack on due process grounds. In the case of the California parental responsibility statute, its vague language has given district attorneys a tremendous amount of discretion to decide who is eligible for prosecution. The Los Angeles District Attorney's Office, for example, has developed its own procedures for determining when a parent's behavior constitutes an offense under the act.[41] A law

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[39] The Court stated: "social policy may impose a duty to protect. The relationship between a parent and a child exemplifies a special relationship where the duty to protect is imposed." *Williquette*, 129 Wis. 2d at 245, 385 N.W.2d at 152.

[40] The relevant section now reads:

> (a) A person responsible for the child's welfare is guilty of a Class C felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused great bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of great bodily harm by the other person or facilitates the great bodily harm to the child that is caused by the other person.
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> (b) A person responsible for the child's welfare is guilty of a Class D felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of bodily harm by the other person or facilitates the bodily harm to the child that is caused by the other person.

WIS. STAT. ANN. § 948.03(4)(a)-(b) (West Supp. 1990).

[41] The following guidelines describe the procedures that the Los Angeles District Attorney created to implement § 272:

> Upon referral from the Los Angeles Police Department, the District Attorney's Truancy Mediation Program or the Probation Department, a Deputy City Attorney will review the case to determine if sufficient evidence exists to establish a violation of the parental accountability provisions of

that allows for such extensive delegation of legislative authority, including what amounts to defining the offense itself, raises serious questions about its constitutionality.

II. REGULATING THE FORM OF PARENTAL RESPONSIBILITY LAWS

In order to withstand constitutional scrutiny, parental responsibility laws must meet at least three fundamental requirements: (1) the law cannot be founded on a legal presumption that lacks rationality; (2) the language of the statute or ordinance cannot be so vague as to fail to provide fair notice and minimal standards of enforcement; and (3) the law must be narrowly drafted to avoid overinclusiveness. Specifically, parental responsibility laws rest on the common legal presumption that the child's delinquent behavior or abused condition is a consequence of poor parenting. Accordingly, this first prong must be established to avoid undermining the entire class of these laws. A deficiency in the second and third

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Penal Code section 272. The City Attorney will decide at that time whether the case should be directed to the Parenting Program for a hearing, prepared for criminal prosecution or returned for insufficient evidence according to the elements of the crime. While no factor will singularly determine whether a case should be accepted, each of the following criteria should be considered in any case presented for hearing or prosecution.

1. A detailed description of the acts or circumstances which brought the juvenile within Sections 300, 601 or 602 of the Welfare and Institutions Code; (Although final adjudication of juvenile proceedings is not a requirement for a filing against the parent, any available documentation of the juvenile proceedings, such as arrest reports and interviews should be included in the case file);

2. A detailed description of the acts or omissions of duty on the part of the parent which caused or encouraged the juvenile to come within the above provisions;

3. The number and type of warnings given to the parent and by whom;

4. Whether any parenting programs have been offered to the parents;

5. The statements and attitude of parents and the juvenile during the investigation; (Every effort should be made to thoroughly interview parents concerning the delinquency problem and their efforts to correct it. *Miranda* warnings should be given when appropriate.);

6. The parents' present actual ability or inability to supervise and control the offending juvenile (discuss whether there are any circumstances beyond the control of the parent that may contribute to an inability to effectively supervise and control);

7. The experience and training of officers involved in the investigation;

8. Neighborhood complaints or other corroboration of the problem with the juvenile and/or the parents;

All filing decisions will be made on a case by case basis.

CITY ATTORNEY PARENTING PROGRAM PROCEDURES (CAPP) (Sept. 1989).

requirements, however, may be remedied, since lawmakers can modify the law to clarify its purpose and scope.

A. *Legislative Presumptions*

Legislatures manufacture legal presumptions primarily as a matter of convenience to aid in both the law's construction and application. From the lawmakers' perspective, it is much easier to use sweeping language that incorporates presumptions than to identify the relationships among every combination of facts concerning the regulated activity. In the context of the criminal law, presumptions may also reflect a legislative intent to make the prosecution of a crime easier by simply assuming the existence of certain facts.

The Supreme Court has had the opportunity to rule on the constitutionality of legislative presumptions on several occasions.[42] Since the Court's opinion in *Mobile, Jackson & Kansas City R.R. v. Turnipseed Administration,*[43] a consensus has developed that presumptive language that functions in an arbitrary or capricious manner violates the due process clauses of the fifth and fourteenth amendments. The first tier of the Court's current two-part analysis is the "rational connection test," which evaluates the relationship between the fact that is presumed to be true and the fact that must be proven. Although this test was first articulated in *Turnipseed,* the Court refined its language in *Tot v. United States*:[44] "[u]nder our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection . . . ."[45]

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[42] *See, e.g.,* Leary v. United States, 395 U.S. 6 (1969) (finding unconstitutional as applied the presumption in 21 U.S.C. § 1769 that a possessor of marijuana is deemed to know of its unlawful importation); United States v. Romano, 382 U.S. 136 (1965) (finding unconstitutional the presumption in 26 U.S.C. § 5601(b)(1) that the presence of defendant at an illegal still site is evidence of the defendant's possession, custody, or control of the still); Tot v. United States, 319 U.S. 463 (1943) (finding unconstitutional the presumption in § 2(f) of the Federal Firearms Act that possession occurred through interstate transaction); Mobile, Jackson & Kansas City R.R. v. Turnipseed Admin., 219 U.S. 35 (1910) (upholding as reasonable a presumption that derailment of railway cars is due to negligence in construction, maintenance, or operation of the train or track).

[43] 219 U.S. 35 (1910).

[44] 319 U.S. 463 (1943).

[45] *Id.* at 467.

Implicit in all parental responsibility laws is the presumption that parents can and do affect the behavior of their children.[46] A breach of the parental duty is established according to the actions or characteristics of the child. The fact presumed is the parent's influence, or lack thereof, and the fact to be proven is the child's behavior or condition. While the connection between the two is not always uniform, the presumption of the relationship is rational.[47]

A legislature considering the adoption of a parental responsibility law would have little difficulty finding evidence documenting the linkage between parenting practices and delinquency.[48] Numerous sociological studies attest to the significant influence that parents wield in averting their children from antisocial behavior.[49] Researchers have not only examined the interaction of parent and child in the context of delinquency, they have also isolated characteristics of that relationship that appear to be correlated with juvenile violence. One of the most important variables is the quality of parental supervision and monitoring of the child's behavior.[50] Supervision or monitoring refers to the parents' "awareness of their child's peer associates, free time activities, and physical whereabouts when outside the home."[51] Lax supervision is correlated with

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[46] *See, e.g.*, State v. Hamilton, 501 A.2d 778, 779 (Del. Sup. 1985) (noting that the Delaware "statutes and the case law imposing liability presume the obvious, that in our culture, the parent of a child, with whom that child resides, has authority and control over the child"), *aff'd*, 515 A.2d 397 (Del. Sup. 1986).

[47] *See infra* notes 48-55 and accompanying text.

[48] Statutory presumptions seldom are implicated in situations involving child abuse, since what is prohibited typically is a direct consequence of the parent's act or omission.

[49] *See infra* notes 50-55 and accompanying text. *But see* S. SAMENOW, BEFORE IT'S TOO LATE: WHY SOME KIDS GET IN TROUBLE AND WHAT PARENTS CAN DO ABOUT IT (1989) (arguing that irrespective of the parent's influence, it is the child who ultimately chooses to be delinquent).

[50] *See* Wilson, *Parental Supervision: A Neglected Aspect of Delinquency*, 20 BRIT. J. CRIMINOLOGY 203, 204 (1980).

[51] Snyder & Patterson, *Family Interaction and Delinquent Behavior*, in HANDBOOK OF JUVENILE DELINQUENCY 225-26 (H. Quay ed. 1987).

delinquency[52] irrespective of social handicap and place of residence.[53] According to one pair of researchers:

> In the lax style, parents are not sufficiently attuned to what constitutes problematic or antisocial behavior in their children. Consequently, they allow much of it to slip by, without disciplinary action. For a variety of reasons, they fail to recognize or accept the fact that their children are involved in deviant, antisocial, or even violent actions. They simply do not believe it is happening, or they convince themselves that there is very little they can do about it.[54]

The same inattentive practices that have been correlated with general delinquency also appear to be significant in explaining violent and aggressive behavior in juveniles.[55]

The conclusion that parents exert a substantial degree of influence over the behavioral development of their children is not surprising. The Supreme Court's analysis of presumptions does not end, however, with a mere finding that the fact presumed may be related to the fact proven. The second part of the Court's analysis includes an element of probability. In *Leary v. United States*,[56] the Court stated: "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary,' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[57] Thus, a parental responsibility law that defines a parent's culpability based on the delinquent status of the

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[52] *See* L. GEISMAR & K. WOOD, FAMILY AND DELINQUENCY: RESOCIALIZING THE YOUNG OFFENDER 25 (1986); W. THORNTON, L. VOIGT & W. DOERNER, *supra* note 7, at 205-06; Patterson, *Some Speculations and Data Relating to Children Who Steal*, in THEORY AND FACT IN CONTEMPORARY CRIMINOLOGY 204 (T. Hirschi & M. Gottfredson eds. 1980); Patterson & Dishion, *Contributions of Families and Peers to Delinquency*, 23 CRIMINOLOGY 63, 76 (1985); Stanfield, *The Interaction of Family Variables and Gang Variables in the Aetiology of Delinquency*, 13 SOC. PROBS. 411 (1966); *see also* R. Kramer, *supra* note 33, at 216; Hanson, Henggeler, Haefile & Rodick, *Demographic, Individual and Family Relationship Correlates of Serious and Repeated Crime Among Delinquents and Their Siblings*, 52 J. CONSULTING & CLINICAL PSYCHOLOGY 528 (1984) (noting a relationship between delinquency and parents' general lack of control over the child); Wells & Rankin, *Direct Parental Controls and Delinquency*, 26 CRIMINOLOGY 263 (1988) (arguing that "direct controls" over children can affect delinquency).

[53] *See* Wilson, *supra* note 50, at 231.

[54] C. BARTOL & A. BARTOL, JUVENILE DELINQUENCY 211 (1989).

[55] *See* P. STRASBURG, VIOLENT DELINQUENTS 58 (1978); *see also* Sorrells, *Kids Who Kill*, 23 CRIME & DELINQ. 312, 318 (1977) (noting the relationship between juvenile violence and parents' failure as proper role models).

[56] 395 U.S. 6 (1969).

[57] *Id.* at 36.

child could only stand if there was "substantial assurance" that the phenomenon of juvenile delinquency "more likely than not" results from the acts or omissions of the parent. This presumption greatly exceeds the available evidence on juvenile delinquency.

The role of presumptions in parental responsibility laws was addressed by a New Jersey appeals court in *Doe v. City of Trenton*.[58] In that case, the parent of a thirteen year old boy, who had been convicted for the second time in one year of violating the public peace,[59] was charged with breach of the City of Trenton's parental responsibility ordinance.[60] The court found that the ordinance violated due process based on the lack of rationality in the presumption that the child's misconduct "more likely than not" resulted from any active or passive wrongdoing on the part of the parents.[61] The court wrote:

> The City of Trenton provides us with nothing which would support a finding that parental influence is an overriding cause of juvenile misconduct. Certainly, there has been demonstrated no basis for a court to take judicial notice of such a proposition. Nor can it be said to be self-evident. Indeed, there is nothing to suggest that there is any calculus of probabilities which would compel such a conclusion.[62]

The New Jersey court's analysis seems correct. The multiplicity of factors that may lead a child to commit a delinquent act are not

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[58] 143 N.J. Super. 128, 362 A.2d 1200 (1976), *aff'd*, 75 N.J. 137, 380 A.2d 703 (1977).

[59] "Violations of the public peace" included any adjudication of delinquency or being a juvenile in need of supervision (JINS). *See id.* at 1202.

[60] The ordinance read in part:

> It shall be unlawful for any parent to assist, aid, abet, allow, permit, suffer or encourage a minor to commit a violation of the public peace, as defined herein, either by overt act, by failure to act or by lack of supervision and control over such minor. . . . If at any time within one year of the giving of such notice, such minor shall be charged with a violation of the public peace, and shall again be adjudicated delinquent, it shall be presumed, subject to rebuttal by competent evidence that the parents of said minor during said period of time, allowed, permitted or suffered said minor to commit a violation of the public peace.

Doe, 143 N.J. Super. at 130 n.1, 362 A.2d at 1201-02 n.1.

[61] *Id.* at 131, 362 A.2d 1203.

[62] *Id.*

dominated by any single influence.[63] The weakness in the Trenton ordinance is its attempt to link all juvenile delinquency to one antecedent—the parent's behavior. The court's holding in this sense is a limited one;[64] it does not deny an overriding parental role in more strictly defined juvenile activities. An ordinance that addressed a narrower range of child behavior, and that closely linked the parent's role as supervisor to that behavior would not encounter the objections that the New Jersey court posed in *Doe*.[65]

B. *The Requirements of Fair Warning and Minimal Standards of Enforcement*

Legislative acts also must pass a vagueness threshold to pass constitutional muster. The "void-for-vagueness" doctrine[66] of the due process clauses of the fifth and fourteenth amendments mandates that any criminal law which is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application"[67] must be struck down as void.

Vague laws suffer from two fundamental defects. First, they fail to provide fair warning as to what acts are specifically forbidden.[68]

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[63] *See, e.g.*, W. THORNTON, L. VOIGT & W. DOERNER, *supra* note 7, at 81-263 (discussing biological, psychological, sociological, and situational theories of delinquency); Wells & Rankin, *supra* note 52, at 263-64 (noting multiplicity of variables affecting delinquency).

[64] The limited nature of the court's holding is evident in the way it phrased the issue: "The precise question before this court is whether we may state with 'substantial assurance' that a minor's second public peace adjudication was 'more likely than not' the result of passive or active wrongdoing on the part of the minor's parent or parents." *Doe*, 143 N.J. Super. at 132, 362 A.2d at 1203.

[65] In addition to examining the validity of the presumption, lawmakers should also consider the likelihood that the presumption will disproportionately affect certain identifiable groups such as people of low-income, single parents, and racial and ethnic minorities. Although beyond the scope of this Comment, the risk of equal protection violations should not be discounted.

[66] Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *See* United States v. Harriss, 347 U.S. 612, 617 (1954). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960) (describing the application of the doctrine in various Supreme Court decisions).

[67] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

[68] As Justice Holmes explained:

> Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.

McBoyle v. United States, 283 U.S. 25, 27 (1931).

The Supreme Court has held that: "[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."[69] The second and most serious defect according to the Supreme Court[70] is that statutory vagueness violates due process by allowing for arbitrary and discriminatory enforcement.[71] "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis . . . ."[72]

For purposes of vagueness analysis, parental responsibility laws can be classified into two general categories—omnibus and result-defined. Both classifications consist of language describing three elements: (1) the parent or guardian, (2) the child, and (3) the prescribed guidance. For example, section 272 of the California Penal Code states that "a parent or legal guardian to any person under the age of 18 years shall have the duty to exercise reasonable care, supervision, protection, and control over their minor child."[73] The first two elements are stated explicitly in the statute and the "duty to exercise reasonable care, supervision, protection, and control" constitutes the final element.

Result-defined laws, however, include one additional element; they add an objective for the parent's guidance. For example, many states and municipalities have enacted laws requiring parents to ensure that their children attend school.[74] The Maryland compulsory public school attendance statute provides that "[e]ach person who has under his control a child who is 6 years old or older and under 16 shall see that the child attends school or receives instruc-

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[69] Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939).

[70] The Court has stated:

> Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine is "not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement."

Kolender v. Lawson, 461 U.S. 352, 357-58 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).

[71] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 170 (1972).

[72] Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972).

[73] CAL. PENAL CODE § 272 (West Supp. 1990).

[74] Although school attendance laws, as well as curfew restrictions, do not specifically address violent activities, they show by analogy how parental responsibility laws can be narrowly drafted to avoid due process challenges. *See infra* notes 80-85 and accompanying text.

tion as required by this section."[75] The penalty for breach of this duty is a fine, not to exceed fifty dollars per absence or imprisonment for not more than ten days, or both.[76] This law includes the first three elements (parent, child, and guidance), and adds the objective of the guidance: "that the child attends school or receives instruction as required by this section."[77]

As a matter of sound policy, the objective of the guidance itself should also meet two criteria in order to prevent void-for-vagueness challenges. First, it must be sufficiently definite. A law that imposed a duty on parents to protect their children from evil would not withstand constitutional scrutiny. What constitutes "evil" is subject to many conflicting interpretations, leaving the parent without adequate notice of the parameters of the duty in question. Second, the objective can not depend on an irrational presumption.[78] A law that holds parents criminally liable for failure to supervise their children, and then finds a lack of supervision in any situation involving the child's delinquency probably presumes too much.[79] The law must be narrowly drafted so that the parent's influence on the juvenile's activity is not overwhelmed by other intervening variables.

In the case of *In Re Jeannette L.*,[80] a Maryland court of appeals upheld the constitutionality of Maryland's compulsory school attendance statute against a void-for-vagueness challenge.[81] The law under attack was result-defined, since it held the parent responsible for the child's attendance at school, and not his or her status as a delinquent. The court found that the language was sufficiently definite to notify parents of their prescribed duties. Their familiarity with the need to attend school, and frequent involvement in its affairs, strengthens the presumption that a child's failure to attend is a consequence of the parent's lack of attention.

Curfew ordinances are another example of parental responsibility laws that are result-defined, and hence can meet constitutional standards of notice and enforcement if narrowly drafted. In

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[75] MD. EDUC. CODE ANN. § 7-301(c) (1989).

[76] *See id.* § 7-301(e)(2).

[77] *Id.* § 7-301(c).

[78] *See supra* notes 42-45 and accompanying text.

[79] *See Doe*, 143 N.J. Super. at 133, 362 A.2d at 1203.

[80] 71 Md. Ct. App. 70, 523 A.2d 1048 (1987).

[81] *See supra* note 66 and accompanying text; *see also* Commonwealth v. Ross, 17 Pa. Commw. 105, 330 A.2d 290 (1975) (upholding the enforceability of Pennsylvania compulsory school attendance statute).

Bykofsky v. Borough of Middletown,[82] a federal district court upheld a curfew ordinance against a void-for-vagueness challenge. The ordinance provided that "it is unlawful for a parent having legal custody of a minor knowingly to permit or by inefficient control to allow such minor to be on or remain upon the street in violation of the curfew."[83] The ordinance also included many exceptions that permitted minors to be on the streets during the curfew hours. The court struck down language in three of the exceptions, but upheld those provisions which had a direct, logical nexus with the interests of both the parent and child,[84] including such circumstances as when the parent accompanied the child, the child was returning from a school event, or the parent had notified the police of the child's need to be on the street during the curfew hours.[85] The exceptions revealed a legislative intent to make the objective of the parent's guidance not simply to remove children from the streets during certain hours, but to ensure that parents were in control of their children after the curfew hour.

Unlike result-defined parental responsibility laws, omnibus laws are much more vulnerable to attack under the void-for-vagueness doctrine. Omnibus statutes and ordinances merely define a

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[82] 401 F. Supp 1242, *aff'd*, 535 F.2d 1245 (3d Cir. 1975), *cert. denied*, 429 U.S. 964 (1976).

[83] *Id.* at 1247.

[84] The court reasoned:

> The ordinance prohibits minors of specific age groups from being on the streets of the Borough during clearly specified hours unless they are accompanied by a parent or otherwise qualify under one of the numerous exceptions. The exceptions are necessarily couched in language which classify the types of activities and the kinds of circumstances which are outside the proscription of the ordinance, it being impossible to compile an all-inclusive list of every factual situation which would warrant a minor being present on the streets during the curfew hours. The ordinance clearly gives fair warning as to what it proscribed and through mayoral advisory opinions (see Section 9) provides a means for the citizenry to determine officially in any given factual situation what is prohibited. Cf. Cox v. Louisiana, 1965, 379 U.S. 559, 568-569, 85 S.Ct. 476, 13 L.Ed.2d 487 ("near" the courthouse not impermissibly vague, particularly in light of on-the-spot administrative interpretation by officials charged with enforcing statute upon which demonstrators could rely). The ordinance contains no broad invitation to subjective or discriminatory enforcement and does not deposit unbridled or unlimited discretion in the hands of law enforcement officials.

Id. at 1252-53.

[85] *See id.* at 1246-47. The many exceptions to the curfew probably saved the ordinance from a challenge of overbreadth. *See infra* notes 88-99 and accompanying text.

relationship between the parent and child, and do not restrict the parent's liability to well-defined circumstances. Stating that a parent must exercise reasonable control or supervision over a child does not provide notice of what behavior the state seeks to prohibit. Of even greater concern than the lack of notice is the tremendous discretion that such regulations give to law enforcement officials. Section 272 of the California Penal Code[86] again provides an excellent example. As a consequence of the vagueness in this statute, the District Attorney's Office for Los Angeles County established its own guidelines to determine when the statute had been violated.[87] The possibility of arbitrary enforcement of this law is great, since the definition of the crime itself can vary from case to case.

C. *The Problem of Overinclusiveness*

In addition to vagueness, omnibus parental responsibility laws are vulnerable to attack on grounds of overinclusiveness.[88] Any enactment that "reaches a substantial amount of constitutionally protected conduct" is void.[89] The sweeping language of the omnibus laws likely infringes on aspects of the parent-child relationship that have found protection in the Constitution. As previously noted, parents have a liberty interest in deciding how to raise their children.[90] *Pierce v. Society of Sisters*,[91] as well as other Supreme Court cases,[92] provide strong support for parental

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[86] *See supra* note 29 and accompanying text.

[87] *See supra* note 41.

[88] The Supreme Court has commented on the close connection between overinclusiveness and vagueness, and the problem the former creates in the context of the criminal law:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.

United States v. Reese, 92 U.S. 214, 221 (1876).

[89] Village of Hoffman Estates v. Flipside, Inc., 455 U.S. 489, 494 (1982). "A law is void on its face for overbreadth if it 'does not aim specifically at evils within the allowable area of [government] control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise' of protected expressive or associational rights." Aladdin's Castle, Inc. v. City of Mesquite, 630 F.2d 1029, 1038 n.13 (5th Cir. 1980) (quoting Thornhill v. Alabama, 310 U.S. 88, 97 (1940)), *rev'd on other grounds*, 455 U.S. 283 (1982).

[90] *See supra* notes 15-21 and accompanying text.

[91] 268 U.S. 510 (1925).

[92] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (upholding right of the Amish

privacy and the family's freedom from state interference. The right of intimate family association is also protected under the first amendment. In *Roberts v. United States Jaycees*,[93] the Supreme Court elaborated on the Bill of Rights' significance to the family:

> The Court has long recognized that, because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of certain kinds of highly personal relationships a substantial measure of sanctuary from unjustified interference by the State. . . . The personal affiliations . . . entitled to this sort of constitutional protection are . . . the creation and sustenance of a family . . . the raising and education of children . . . .[94]

A law that allows the state to review virtually every aspect of the parent's supervision over the child is inconsistent with the importance that the Supreme Court has assigned to the right of intimate family association and its deference to parents in matters involving child rearing. One critic of the California parental responsibility statute has written:

> Almost every parent must deal with a wide range of misbehavior by their children. The approaches taken to discipline and guidance in this area are infinite in variation. Usually parents are in the best position to know what is best for their children in a world in which the effects of parental discipline and guidance is limited by sometimes overwhelming forces in the community at large. The challenged provision authorizes law enforcement authorities to second guess *every* parental decision with the threat of criminal penalties if a parent has made the wrong choices as it appears to an unforgiving police officer or prosecutor after the fact based on the hidden standardless judgments of those law enforcement authorities.[95]

Parental responsibility laws that specify an objective of the parent's guidance also can be struck down for overbreadth if they are not narrowly tailored. In *Johnson v. City of Opelousas*,[96] the Fifth Circuit Court of Appeals struck down a curfew ordinance for infringing upon constitutionally protected activity. In that case, the City of Opelousas passed an ordinance that prohibited anyone

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not to send their children to high school); Meyer v. Nebraska, 262 U.S. 390 (1923) (allowing children to be taught in a language other than English).

[93] 468 U.S. 609 (1984).

[94] *Id.* at 618-19.

[95] Brief for Plaintiff at 22-23, Williams v. Reiner, No. C 731 376 (Super. Ct. of Cal., County of Los Angeles 1990).

[96] 658 F.2d 1065 (5th Cir. 1981).

under 17 years of age from being on the city streets during certain hours except when accompanied by a parent or other responsible adult or on an emergency errand.[97] The court found that the ordinance violated the constitutionally protected rights of minors and their parents, noting that, unlike the ordinance in *Bykofsky v. Borough of Middletown*,[98] the Opelousas ordinance made no provision for protected associational activities such as attendance at school meetings or religious functions. The court also felt that the ordinance would prohibit parents from encouraging their children's participation in these protected activities.[99]

III. PREREQUISITES OF PUNISHMENT

In addition to satisfying any requirements that the Constitution imposes, parental responsibility laws should also adhere to criminal law principles. The criteria that the state creates to isolate culpable behavior largely determine the distribution of the resulting punishment. Conduct, in order to be criminal, typically implicates five elements: (1) actus reus (an act or omission), (2) mens rea, (3) concurrence of the act or omission and mens rea, (4) causation, and (5) harm.[100] Before the state can punish, it must demonstrate either that these elements are present or that an exception that renders one or more of them unnecessary applies. For example, in some circumstances, the state may wish to hold its citizens strictly liable for the consequences of their conduct, eliminating the mens rea and concurrence requirements. In contrast, an act or omission is always required since the imposition of criminal sanctions cannot proceed from the mere possession of undesirable thoughts.

Parental responsibility laws raise difficult issues concerning the act, mens rea, and causation elements of crime. In those few instances where the criminal law is applicable to family relationships, it typically penalizes affirmative conduct. A parent intentionally injures a child and is punished for abuse. Parental responsibility laws, in contrast, punish passive conduct—the parent is penalized for failing to supervise or protect the child.

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[97] *See id.* at 1067 n.1.

[98] 401 F. Supp 1242 (1975), *aff'd*, 535 F.2d 1245 (3d Cir. 1975), *cert. denied*, 429 U.S. 964 (1976).

[99] *See Johnson*, 658 F.2d at 1072.

[100] *See* W. LAFAVE & A. SCOTT, *supra* note 10, § 3.1, at 269-71.

A. *Criminal Omissions*[101]

Criminal liability for an omission can arise in one of two ways. First, the state can define the omission itself as an offense. For example, in most states it is a crime for a motorist to ignore a police officer's command to stop; the failure to stop constitutes the offense.[102] Second, a duty to act can be created with liability resulting from nonperformance.[103] Parental responsibility laws are part of this latter category. The state imposes an affirmative duty on the parent to provide guidance, which if ignored leads to criminal sanctions. The source of this duty is based on the relationship of the parent to the child.[104]

There are at least two reasons why the imposition of criminal liability for nonperformance of a duty is controversial. First, a governmental order to act is considered far more intrusive than a demand to refrain from engaging in proscribed conduct.[105] When the duty concerns family relationships, the degree of intrusiveness is even greater. Second, nonperformance is difficult to define since the law only describes the duty and not the acceptable means by which it is to be discharged.[106] There is far more uncertainty created when the criminal law attempts to punish what remains after delimiting the permissible, rather than prohibiting specific affirmative behaviors.

Omnibus parental responsibility laws create a wide entree for state meddling in family affairs. Since the element of guidance is defined so broadly, virtually any child's misbehavior can be traced to an omission on the part of the parent. This results in the de facto imposition of vicarious liability; the parents are punished for the misbehaviors of the child and not their own acts or omissions.

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[101] *See generally* Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367 (1965); Hughes, *Criminal Omissions*, 67 YALE L.J. 590 (1958); Kirchheimer, *Criminal Omissions*, 55 HARV. L. REV. 615 (1942); Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 N.Y.L. SCH. L. REV. 101 (1984).

[102] *See, e.g.*, 75 PA. CONS. STAT. ANN. § 3733 (Purdon 1977) (fleeing or attempting to elude police officer).

[103] The Model Penal Code has recognized both of these routes: "Liability for the commission of an offense may not be based on an omission unaccompanied by action unless: (a) the omission is expressly made sufficient by the law defining the offense; or (b) a duty to perform the omitted act is otherwise imposed by law." MODEL PENAL CODE § 2.01(3) (Proposed Official Draft 1962).

[104] *See supra* note 10 and accompanying text.

[105] *See* Robinson, *supra* note 101, at 104.

[106] *See id.*

While the danger of such abuse is diminished in result-defined laws, since at least an objective of the parent's guidance is created, it is still sufficiently present to warrant concern. Even within this latter category, the law rarely reflects rational expectations about the guidance a parent can wield over a child or young adult.

At least one court has already ruled that the imposition of vicarious liability on parents for the acts of their children violates due process. In *State v. Akers*,[107] the New Hampshire Supreme Court ruled that a state statute[108] that held parents responsible for violations their children committed while operating "off highway recreational vehicles" contradicted the state's constitution and criminal code. The court found that a prerequisite to criminal liability is an act or omission, noting the command of the New Hampshire Criminal Code that "[a] person is not guilty of an offense unless his criminal liability is based on conduct that includes a voluntary *act* or the voluntary omission to perform an act of which he is physically capable."[109] Given that the statute failed to specify any act or omission on the part of the parents before imposing criminal liability, the court held that the statute violated due process by criminalizing the status of parenthood. "[W]e are convinced that the status of parenthood cannot be made a crime. This, however is the effect of [the statute]. . . . There is no other basis for criminal responsibility other than the fact that a person is the parent of one who violates the law."[110]

The principles that the New Hampshire Supreme Court articulated in *Akers* echo those established in the U.S. Supreme Court's decision in *Robinson v. California*.[111] There, the Court struck down a California law that made it a criminal offense for a person to "be addicted to the use of narcotics."[112] It noted that the law called for punishment based on the mere status of addiction, and did not require any overt act or omission. The Court held that:

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[107] 119 N.H. 161, 400 A.2d 38 (1979).

[108] The statute stated in part that "[t]he parents or guardians or persons assuming responsibility will be responsible for any damage incurred or for any violations of this chapter by any person under the age of 18." N.H. REV. STAT. ANN. 269-C:24 IV (1977).

[109] N.H. REV. STAT. ANN. 626:1I (1987).

[110] *Akers*, 119 N.H. at 163, 400 A.2d at 40.

[111] 370 U.S. 660 (1962).

[112] CAL. HEALTH & SAFETY CODE § 11721 (West 1975).

> This statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.[113]

In the same way, any law that punishes parents without respect to actus reus, holding them culpable based solely on their status as parents, will be unconstitutional. As one court noted: "[s]ome act of commission or omission lies at the foundation of every crime."[114] Lawmakers drafting parental responsibility laws should avoid the pitfall of vicarious liability by (1) framing the law with respect to the parent's behavior, and (2) requiring that the parent have an independent interest either in the child's activity or in the forum[115] where it occurs.[116] The latter requirement would reinforce the notion that the parent is not being punished for the acts of the child, as well as help to avoid defenses based on ignorance of the law. The specification of the parental interest would necessarily correspond with rational expectations of parental control.

To the extent that parental responsibility laws create extraordinary duties beyond rational expectations of parental control, they may even reach the realm of impossibility. The state cannot impose a duty to do the impossible, such as requiring that parents actively supervise their children at all times.[117] The parent must have the

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[113] *Robinson*, 370 U.S. at 666.

[114] State v. Labato, 7 N.J. 137, 148, 80 A.2d 617, 622 (1951), *overruled*, State v. Davis, 68 N.J. 69, 342 A.2d 841 (1975).

[115] Two examples where the parent has such an independent interest in the forum are the home and school. See *infra* notes 143-50 and accompanying text.

[116] *See infra* note 150 and accompanying text.

[117] In United States v. Park, 421 U.S. 658 (1975), the Supreme Court discussed the defense of impossibility to charges brought under the Federal Food, Drug, and Cosmetic Act of 1938:

> The theory upon which responsible corporate agents are held criminally accountable for "causing" violations of the Act permits a claim that a defendant was "powerless" to prevent or correct the violation to "be raised defensively at a trial on the merits." If such a claim is made, the defendant has the burden of coming forward with evidence, but this does not alter the Government's ultimate burden of proving beyond a reasonable doubt the

capacity to exercise the necessary level of guidance before being held criminally liable for failing to meet that standard. In jurisdictions where parental responsibility laws are in force, not every prosecutor is willing to recognize the parent's inability to control the child as a defense to prosecution. For example, the guidelines that the Los Angeles District Attorney's Office has established to implement California's parental responsibility statute provide that "[i]f the parents . . . are *unable* or unwilling to control their minor children, they will be subject to vigorous prosecution by our office."[118]

The assignment of mens rea in parental responsibility laws is also problematic. Their intrusiveness into the family is at a peak when mens rea is not an element of the offense; the imposition of strict liability[119] eliminates the defense of mistake of fact and the parent is presumed to know the facts which give rise to the duty to act. Although certain commentators have criticized the statutory imposition of strict liability for crimes,[120] with at least one commentator claiming that knowledge is a prerequisite to culpability for an omission,[121] there is no question that the Constitution permits the elimination of mens rea as an element of a criminal offense.[122] In the landmark case of *United States v. Balint*,[123]

> defendant's guilt, including his power, in light of the duty imposed by the Act, to prevent or correct the prohibited condition.

Id. at 673 (citations omitted).

[118] CITY ATTORNEY PARENTING PROGRAM PROCEDURES, *supra* note 41, at 4 (emphasis added).

[119] It is important not to confuse strict liability with vicarious liability. The former eliminates the requirements of mens rea and concurrence, and allows the individual to be punished for the result alone. Vicarious liability, in contrast, imputes the act or omission of one person to another. A parent, for example, could be held liable for the behavior of the child under this doctrine.

[120] *See* Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 422-25 (1958); Hippard, *The Unconstitutionality of Criminal Liability Without Fault: An Argument for a Constitutional Doctrine of Mens Rea*, 10 HOUS. L. REV. 1039, 1057 (1973); Johnson, *Strict Liability: The Prevalent View*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1518, 1520-21 (S. Kadish ed. 1983) (noting that strict liability is fundamentally unfair since it can lead to punishing persons who have taken all reasonable steps to comply with the law); Note, *Criminal Liability*, *supra* note 12, at 345-47.

[121] *See* Note, *"Parental Responsibility" Ordinances*, *supra* note 12, at 1570 (arguing for "the giving of notice to the parent of his child's specific bad conduct before a duty will be imposed upon that parent to guard against future similar actions").

[122] *See* W. LAFAVE & A. SCOTT, *supra* note 10, at 346; Note, *Criminal Liability Without Fault: A Philosophical Perspective*, 75 COLUM. L. REV. 1517, 1528 (1975) (listing the areas in which courts have upheld statutes that impose liability on individuals without mens rea).

[123] 258 U.S. 250 (1922).

the Supreme Court ruled that knowledge was not a necessary element of an offense created under a federal narcotics statute, sustaining an indictment that carried a maximum penalty of five years in prison.[124] The Court has since upheld the holding in *Balint* on numerous occasions.[125] "We do not go with Blackstone in saying that 'a vicious will' is necessary to constitute a crime . . . for conduct alone without regard to the intent of the doer is often sufficient."[126] Provided that the parental duty is consistent with what is normally contemplated to be in the parent's supervisory and protective domain,[127] lawmakers remain free to assign the level of culpability that they deem appropriate, including strict liability. This is consistent with the Court's long-standing belief that the assignment of mens rea is a task for the legislature.[128] "There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition."[129]

The policy rationales of the criminal law justify the delegation of this discretion to elected representatives. The legislature may believe, for example, that the strict liability standard serves a useful deterrent function, and will force people to be more diligent in seeking out relevant facts.[130] Parents, for example, who are

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[124] *See id.* at 251-54.

[125] *See, e.g.*, United States v. Park, 421 U.S. 658, 672-73 (1975) (holding food retailer strictly liable under provisions of Federal Food, Drug and Cosmetic Act); Morisette v. United States, 342 U.S. 246, 260-63 (1952) (approving the Court's holding in *Balint*, but refusing to construe the mere omission of intent from a statute as eliminating that element from the crime); United States v. Dotterweich, 320 U.S. 277, 281-83 (1943) (finding a corporate officer strictly liable for shipping misbranded and adulterated drugs).

[126] Lambert v. California, 355 U.S. 225, 228 (1957) (citation omitted).

[127] *See supra* note 117 and accompanying text.

[128] The origins of this rule began with Chief Justice Taft's finding in *Balint* that mens rea "is a question of legislative intent to be construed by the court." *Balint*, 258 U.S. at 252.

[129] *Lambert*, 355 U.S. at 228.

[130] *See* Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960). According to Wasserstrom, "it seems reasonable to believe that the presence of strict liability offenses might have the added effect of keeping a relatively large class of persons from engaging in certain kinds of activity." *Id.* at 737. His argument is bolstered by other statements such as the following:

> An individual who knows that certain future conduct, if engaged in inadvertently, will be punished is given a motive for taking steps *now* to insure that he will not be inadvertent *in the future*. For example, he may establish an enforced daily regimen of attention to certain details of his conduct, previously ignored. In time, such attention may become habitual, thereby decreasing the likelihood of inadvertently violating rules pertaining to that area of conduct and consequently minimizing intrinsically disvaluable

subject to an ordinance that holds them responsible for failing to prevent their child's sale of drugs out of their home would probably be more inclined to inspect the home for narcotics and to monitor the child's visitors.[131] Although imposing strict liability on parents would probably be imprudent at this time given the current state of parental responsibility laws, this impediment could be removed if legislatures begin to draft the enactments according to rational standards of parental control. Until this occurs, parents in many jurisdictions will be subject to vague laws that fail to comport with the reality of contemporary parent-child relations.

B. *Causation*

The lack of specificity in most parental responsibility laws concerning which acts satisfy the parent's duty also leads to questions about the element of causation.[132] In most jurisdictions, in order to impose criminal liability, the defendant's conduct must be both (1) the actual or "but for" cause, and (2) the "proximate" cause of the result.[133] The former requirement necessitates a finding that the result would not have occurred in the absence of the defendant's conduct. The Model Penal Code states that "[c]onduct is the cause of a result when . . . it is an antecedent but for which the result in question would not have occurred."[134] This formulation, however, does not require that the conduct be the exclusive cause of the result. If two causes intervene to bring about a result, and each is itself sufficient, then both are said to be the "actual" causes. In the omission context, actual cause is not useful in assigning liability since it fails to limit those eligible for punishment. In theory, if a child dies in a fire, everyone in a position to rescue the child could be held accountable since "but for" their

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> consequences. The agent's motivation for acting in such a way is his desire to avoid the punishment which he knows will be inflicted if he inadvertently breaks the law.

Note, *supra* note 122, at 1538 n.88.

[131] Any lawmaker considering strict liability should realize, however, that the "great majority of academic writing has opposed absolute liability." S. KADISH & S. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES 316 (1989); *see also supra* note 120.

[132] *See generally* Leavens, *A Causation Approach to Criminal Omissions*, 76 CALIF. L. REV. 547 (1988) (criticizing the concept of "legal duty" as a basis to limit the imposition of liability for omissions).

[133] *See* W. LAFAVE & A. SCOTT, *supra* note 10, § 3.12, at 392.

[134] MODEL PENAL CODE § 2.03(1) (Proposed Official Draft 1962).

omission to rescue, the child would not have perished.[135] For this reason the criminal law largely relies on the second prong of the causation analysis, or "proximate cause," to further restrict the assignment of liability for omissions.

A defendant's conduct is the proximate cause of an outcome if it foreseeably leads to the result or risk created. Again, under the Model Penal Code, only when "the actual result . . . is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or on the gravity of his offense" is criminal liability imposed.[136] The justification for the proximate cause requirement is fundamental fairness, since there are many circumstances where actual cause exists but the final result is far too removed from the conduct for criminal liability to attach.[137]

Unless parental responsibility laws are carefully drafted to reflect the parent's reasonable ability to guide the child as the forum and nature of the child's activity changes, these laws will likely violate the principles of causation. In order to establish actual causation, the state must first establish that the child's misconduct would not have occurred "but for" the parent's neglect. If the law's characterization of the requisite parental guidance is too broad, it may dilute the force of the parent's actions. When this is coupled with a prohibition against a large class of conduct, the parent's guidance may become insignificant, eliminating the parent as the actual cause of the harmful behavior.

Vague laws also fare poorly under proximate cause analysis. As previously noted, the hallmark of proximate cause is foreseeability. Omnibus laws rarely clarify causal linkages since any child misbehavior can be attributed ex post facto to parental inattention. Merely recognizing the existence of a parent-child relationship does not prove causation, since proximate cause requires that the parent's actions predictably lead to the child's misbehavior or abused state. Result-defined laws, in contrast, better elucidate causal linkages by evaluating the parental conduct with regard to a specified activity or forum. This advantage, however, is contingent on the degree of definiteness found in the objective of the parent's guidance. If no

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[135] *See* Robinson, *supra* note 101, at 110.

[136] MODEL PENAL CODE §§ 2.03(2)(b), (3)(b) (Proposed Official Draft 1962).

[137] For example, if *X* tries to shoot *Y* and misses, and *Y* flees in his auto and is killed in an accident, *X*'s conduct is the actual cause of *Y*'s death. "But for" *X*'s attempted murder, *Y* would not have been involved in the auto accident. *X* cannot be held for murder, however, since the ensuing accident was not a foreseeable consequence of *X*'s conduct.

definite objective exists, the specificity necessary to establish proximate cause will still be lacking.

IV. AN ALTERNATIVE MODEL OF PARENTAL CONTROL

Parents cannot realistically be expected to exercise control over their children under all circumstances. Unfortunately, many parental responsibility laws ignore this simple and obvious premise by failing to limit the parent's culpability to situations in which the child's misbehavior or abused condition can foreseeably be attributed to an act or omission on the part of the parent. The recognition of a hierarchy of parental control would aid in the construction of parental responsibility laws in at least four ways. First, a hierarchy of parental control would create a foundation upon which definite and explicit legislation could be crafted. Since the nature of the supervisory relationship between parent and child would cease to be a matter of conjecture, lawmakers could more easily tailor legislation to provide the degree of specificity necessary for notice and minimal standards of enforcement.[138] Narrowly focused legislation would also eliminate challenges based on overinclusiveness.[139] Second, such a model would encourage lawmakers to draft laws that are consistent with realistic expectations of parental capacities. Parents would not be held criminally liable for failing to exercise supervision in situations that are too far removed from their direct oversight. The parent would only be punished for legitimate acts or omissions and not for the status of parenthood.[140] Third, since the model's organization would be rational, there would be no basis to question the underlying legislative presumptions.[141] Any irrational presumptions that would violate due process would be eliminated in the organization of the model itself. Finally, a hierarchy of control would provide substantiation for the element of criminal causation.[142] The linkages between the parent and child would be both explicit and foreseeable.

Since parent-child relationships are highly variable, any model of parental control should account for the parent's changing supervisory role in at least the following three dimensions: (1)

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[138] *See supra* notes 66-87 and accompanying text.
[139] *See supra* notes 88-99 and accompanying text.
[140] *See supra* notes 101-31 and accompanying text.
[141] *See supra* notes 42-65 and accompanying text.
[142] *See supra* notes 132-37 and accompanying text.

spatial, (2) social, and (3) chronological. While none of these considerations alone are dispositive of the level of parental control, each strongly affects the parent's ability to exercise authority over the child.

In the most rudimentary sense, the parent's ability to supervise is contingent on physical proximity to the child. When the parent is in the child's presence, he or she is able to observe the child's behavior and provide immediate reinforcement or punishment. Since the parent typically is the most important authority figure to the youngster,[143] parental control normally will be at a maximum in such circumstances. As the child's spatial proximity to the parent decreases, thus diminishing oversight opportunities, expectations concerning the parent's control also wane.

The level of parental control will also vary according to the social forum where the child's behavior occurs. Activities which take place in the home, for example, are normally recognized as falling within the supervisory purview of the parents, even though they may not be physically present at the time. The parental duty includes responsibility for the maintenance and care of the home and family on a continuous basis. In contrast, the level of parental authority exercised over the child's relationships in other settings may be drastically different. A parent does not have the same ability to monitor and regulate the child's behavior in school or among friends as within the close setting of the home.

Finally, age is relevant to parental supervision.[144] Both the spatial and social dimensions of parental control will fluctuate according to the age of the child. The younger the child, the more dependent he or she will be on the parent for support and guidance. Not only will the child more often be in the presence of the

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[143] *See* W. DAMON, SOCIAL AND PERSONALITY DEVELOPMENT 264-65 (1983); Feiring & Lewis, *The Social Networks of Girls and Boys from Early Through Middle Childhood*, in CHILDREN'S SOCIAL NETWORKS AND SOCIAL SUPPORTS 119 (D. Belle ed. 1989) (noting that the most important part of an infant's social network is the family, specifically the parents); Furman, *The Development of Children's Social Networks*, in CHILDREN'S SOCIAL NETWORKS AND SOCIAL SUPPORTS, *supra*, at 151, 154-55 (commenting that in the first three stages of a child's social needs, the parents play a primary role).

[144] *See* Berndt, *Developmental Changes in Conformity to Peers and Parents*, 15 DEVELOPMENTAL PSYCHOLOGY 608, 615 (1979) (finding that conformity to parents decreases with age); Utech & Hoving, *Parents and Peers as Competing Influences in the Decisions of Children of Differing Ages*, 78 J. SOC. PSYCHOLOGY 267, 272 (1969) (same); Young & Ferguson, *Developmental Changes through Adolescence in the Spontaneous Nomination of Reference Groups as a Function of Decision Content*, 8 J. YOUTH & ADOLESCENCE 239, 250 (1979) (same).

parents, but they will also have primary responsibility for structuring the child's contacts outside of the family.[145] As the child matures, he will spend less time with the parents and will begin to take charge of his own social relationships.[146] Parental control will be correspondingly diminished.[147]

These dimensions of parental supervision (spatial, social, and chronological), provide a basis to analyze the parent's role in juvenile behavior. By applying them to the child's relationships with her surroundings, predictions can be made about those children's activities which the parent realistically can be expected to control. In addition to the child's direct interaction with the parent, the realm of possible child relationships can be classified into the following four distinct tiers: (1) home and family, (2) institutional affiliations, (3) social contacts, and (4) residual interactions.

The significance of the family, as evidenced in part by its unique legal status, and the home, in both its physical and psychological senses, merits separate attention. The authority of the parent is at its height in the home, and it is there that both parent and child frequently seek sustenance and mutual support. No other forum can surpass the influence of the home environment on the child's early development.[148] Outside of this milieu, the child typically must rely on the parent for assistance in dealing with various societal institutions, such as school, government, and religious bodies.[149] The child's comparative lack of sophistication and the formal nature of the interaction will make the parent's assistance obligatory. Often the parent will have an interest in the institution which is separate from the child's, heightening the duty to facilitate the child's orientation to it.[150] The typical youngster will also develop a host of social relationships separate from any familial or

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[145] *See* Feiring & Lewis, *supra* note 143, at 119; Parke & Bhavnagir, *Parents as Managers of Children's Peer Relationships*, in CHILDREN'S SOCIAL NETWORKS AND SOCIAL SUPPORTS, *supra* note 143, at 241, 241-42 (commenting that the most common way families influence a child's social network is through the parent-child relationship).

[146] *See* G. ADAMS & T. GULLOTTO, ADOLESCENT LIFE EXPERIENCES 98-99 (1989); J. HOPKINS, ADOLESCENCE 13, 215 (1983); Bowerman & Kinch, *Changes in Family and Peer Orientation of Children Between the Fourth and Tenth Grade*, 37 SOC. FORCES 206, 207 (1959); Furman, *supra* note 143, at 240.

[147] *See* J. HOPKINS, *supra* note 146, at 215-16; Berndt, *supra* note 144, at 608, 615; Bowerman & Kinch, *supra* note 146 , at 207; Utech & Hoving, *supra* note 144, at 272.

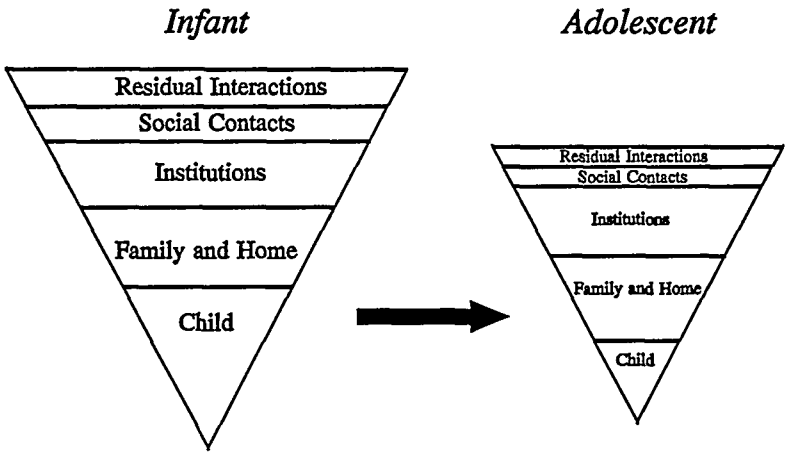
[148] *See* Feiring & Lewis, *supra* note 143, at 119; Furman, *supra* note 143, at 154-55.

[149] *See* Parke & Bhavnagir, *supra* note 145, at 244-45.

[150] *See supra* note 115 and accompanying text.

institutional affiliations.[151] Contacts with friends and other informal associations comprise the third tier of interaction. Any remaining children's activities are residual to these primary classifications, and are remote from the parent's supervision.

This model of parental control can be diagrammed in the following manner:



Each triangle represents a snapshot of the parent's influence at a particular point in the child's development. The area of each level corresponds to the degree of parental control; the greater the area, the greater is the parent's access to the child and more significant is his or her influence. As the diagram indicates, parental guidance is not static; it changes over time and according to the relative importance of other societal factors which diminish the parent's influence.[152] Thus, the parent's role in structuring the youngster's activities is greater for an infant than for an adolescent.[153] The parent can readily examine the infant's physical state for signs of abuse, as well as affect the opportunities for interaction with the other parent, siblings, and friends. In contrast, the opportunities for the parent to exercise guidance are significantly reduced by the time the youth reaches adolescence. At this stage of development, the youngster normally no longer allows the parent to monitor every aspect of his or her physical condition, thereby reducing the opportunity to detect signs of physical abuse. Moreover, the adolescent has developed many important relationships outside of

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[151] *See supra* note 146 and accompanying text.
[152] *See supra* note 146-47 and accompanying text.
[153] *See supra* note 144-47 and accompanying text.

the home and family.[154] Often, these interactions are completely independent of the parent's influence.

The simplicity of this hierarchy does not diminish the import of its message for parental responsibility laws. Holding parents criminally liable for adolescent activities which occur at its outer bounds is tantamount to imposing vicarious liability. This is also true of parental supervision over the physical characteristics of the adolescent, the inner most level in the second diagram. Since the parent can exercise very little control at these points, the parent would be punished based on the status of parenthood and not for failing to meet a reasonable duty. As previously discussed, a parent has no duty to do the impossible.[155]

The vast difference in control between the infant and adolescent requires that lawmakers tailor legislation to reflect the incremental changes which occur in a child's life that lead to this disparity. A parent reasonably should be accountable for the welfare and acts of the infant, since the child is so utterly dependent. In contrast, criminal liability should only attach for certain limited behaviors involving the young adult. These include overseeing relationships with other family members, activities which occur in the home, as well as interactions with various societal institutions in which the parent has an independent interest.[156] The assignment of criminal liability in each of these circumstances, however, does not necessitate that the parent be held to the lowest level of culpability, although this option can not be discounted as a matter of law. If the legislature believes that the state's interests are best served by imposing strict liability, it has the prerogative to do so. Absent strong empirical evidence showing that such a step would markedly improve the law's deterrent effect and spare children unnecessary suffering, it seems unfair to penalize the parent under a strict liability standard. While the benefits of strict liability may be realized in circumstances where the parent has the capacity to exercise near absolute control over the child, its cost—the risk of punishing parents who have made every possible effort to fulfill their obligations—warrants extreme caution.

One situation where the parent is in a position to monitor the child closely is when she is interacting with other family members or residents of the home. Many states hold the parent criminally

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[154] *See supra* notes 146-47 and accompanying text.
[155] *See supra* notes 117 and accompanying text.
[156] *See supra* text following note 115.

liable for failing to protect the child from abuse when it is perpetrated by another member of the household.[157] The courts have upheld the constitutionality of these laws in most every case.[158] The tragic consequences of abuse for the child makes the state's interest in the activity extremely high. At least one state has imposed strict liability on parents for allowing their children to be endangered, including abuse by other family members. In *State v. Lucero,*[159] a New Mexico court of appeals upheld the constitutionality of the state's child abuse statute, which defined abuse of a child as "a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be: (1) placed in a situation that may endanger the child's life or health; or (2) tortured, cruelly confined or cruelly punished."[160] The court interpreted the statute to impose strict liability, and found that this level of culpability was acceptable provided that "the public interest in the matter is so compelling or that the potential for harm is so great that the interests of the public must override the interests of the individual."[161] The New Mexico Supreme Court has since upheld the same statute in a case which involved a mother's conviction for child abuse for failing to prevent her boyfriend from beating her child.[162] The court ruled that mistake of fact and duress were irrelevant,[163] perhaps implying that the defendant's

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[157] *See supra* note 9 and accompanying text.

[158] *See, e.g.,* United States v. Webb, 747 F.2d 278 (5th Cir. 1984) (failing to seek medical attention for son after husband fatally beat him), *cert. denied,* 469 U.S. 1226 (1985); Michael v. State, 767 P.2d 193 (Alaska App. 1988) (upholding conviction for failure to prevent child abuse by wife); Smith v. State, 408 N.E.2d 614 (Ind. App. 1980) (failing to prevent boyfriend from beating child to death); Bowers v. State, 38 Md. App. 21, 379 A.2d 748 (1977) (failing to stop beating by paramour), *aff'd,* 283 Md. 115, 389 A.2d 341 (1979); Pope v. State, 284 Md. 309, 396 A.2d 1054 (1979) (failing to stop child abuse by mother); Palmer v. State, 223 Md. 341, 164 A.2d 467 (1960) (failing to stop fatal beating by paramour); State v. Lucero, 98 N.M. 204, 647 P.2d 406 (1982) (failing to prevent beating by paramour); State v. Walden, 306 N.C. 466, 293 S.E.2d 780 (1982) (failing to prevent assault on son by brother); Commonwealth v. Howard, 265 Pa. Super. 535, 402 A.2d 674 (1979) (failing to prevent abuse by boyfriend); State v. Williquette, 129 Wis. 2d 239, 385 N.W.2d 145 (1986) (upholding conviction of child abuse for leaving children with other parent who physically and sexually abused them).

[159] 87 N.M. 242, 531 P.2d 1215, *cert. denied,* 87 N.M. 239, 531 P.2d 1212 (1975). For a detailed discussion of this case, see Note, *supra* note 9, at 372-73.

[160] N.M. STAT. ANN. § 30-6-1 (1978).

[161] *Lucero,* 87 N.M. at 244, 531 P.2d at 1217.

[162] *See* State v. Lucero, 98 N.M. 204, 647 P.2d 406 (1982).

[163] *See id.* at 206-07, 647 P.2d at 409.

relationship to the child and the fact that the child had been abused were the pivotal factors.

In addition to relationships with other family members, the parent should have a duty to oversee activities within the home. The parent's independent interest in the home's functioning, and that the law is respected within its boundaries, provides a sufficient basis to avoid the imposition of vicarious liability. Examples of parental responsibility laws involving the home are public housing codes which allow for eviction in the event that one or more family members is convicted of a crime committed within the residence. The District of Columbia Department of Housing and Community Development instituted such a program in 1980.[164] In that instance, however, parents were responsible for their children's activities not just in the residential unit but within the entire housing project. The age of the child also was not a factor in establishing liability. Given the size of some public housing developments, it is unreasonable to expect the parent to control the child even in this limited environment. As one tenant lamented: "[s]ome people try hard to raise their children right and it would be bad to evict those people. Parent's don't know (all the time) what their children are doing."[165]

Unfortunately, some laws have extended the parent's duty of supervision far beyond the home, holding out the prospect of eviction based on any criminal activity on the child's part.[166] Housing and Urban Development (HUD) Secretary Jack F. Kemp recently precipitated a political firestorm when he outlined plans to streamline eviction proceedings and utilize asset forfeiture laws to seize leases of suspected drug dealing public housing tenants.[167] The 1988 Anti-Drug Abuse Act authorizes the forfeiture of leases of individuals suspected of selling drugs, even without conviction.[168] Under pressure from constituents to curb crime in federal housing

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[164] Bowman, *City Will Evict Public Housing Families For Crimes,* Wash. Post, May 31, 1980, at A1, col. 2.

[165] *Id.* at A2, col. 2.

[166] *See, e.g.,* Riley, *Annapolis Considers Evictions in Mayor's Antidrug Effort; City Would Remove Public Housing Tenants Convicted of Making or Selling Narcotics,* Wash. Post, Nov. 5, 1988, at B1 (describing Annapolis Housing Authority program to evict convicted drug abusers); UPI, July 14, 1982 (LEXIS, Nexis library, UPI file) (describing Dade County Florida plan to evict families from public housing based on criminal conviction of child).

[167] *See U.S. Seizing Leases of People Suspected In Illegal Drug Deals,* N.Y. Times, June 26, 1990, at A16, col. 1.

[168] *See* 42 U.S.C. § 1437d(5) (1988).

projects, the U.S. Congress passed the eviction legislation, expanding the boundaries of the parent's liability even beyond the housing project itself.[169] Again, when the child's behavior is so remote from the parent's control, it is unjust to hold the parent liable. Only when the criminal activity is committed within the home itself should the parent be eligible for punishment. The Department of Housing and Urban Development (HUD), however, has since developed implementing guidelines which limit lease seizures to "any individual who has 'participated in, or knowingly allowed, at least two felony drug offenses' in a public housing unit."[170]

Liability should also extend outside of the home and beyond family relationships, but only under very limited circumstances. Where both the adolescent and parent share a common interest in a particular forum or institution, it is reasonable to expect the parent to supervise at some level the child's interaction with it.[171] For example, both the parent and child have a common interest in the proper functioning of the schools.[172] The parent reaps the advantages of living in a technologically sophisticated society, which is dependent on an educated workforce, while the child can use this institution to further his or her personal development. For these reasons, as well as the benefits that derive from the parent's relationship with the child, the parent has an interest in the child's attendance at school. This situation further provides a basis for the state to impose liability on the parent when the child is absent without cause.

In circumstances where the child's actions occur outside of the home and the parent's presence, and not in a forum where both the parent and child share a common interest, criminalizing the parent's lack of supervision can not be justified. How a child behaves outside of these settings, alone or among friends, is simply too

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[169] *See id.*

[170] LaFraniere, *U.S. Alters Plan to Evict Drug Dealers; Agents Move to Begin Seizing Public Housing Leases of Suspects*, Wash. Post, June 26, 1990, at A5, col. 1.

[171] *See supra* text following note 115.

[172] In Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969), the Court struck down a New York statute which granted the franchise for school district elections only to residents who owned or leased taxable real property in the district, or were parents of (or had custody of) children enrolled in local schools. The Court was sympathetic to the appellant's argument that "[a]ll members of the community have an interest in the quality and structure of public education" and "the decisions taken by local boards . . . may have grave consequences to the entire population." *Id.* at 630. It held that the provision did not further a compelling state interest which would justify denying the franchise to "seemingly interested" residents. *Id.* at 633.

remote from the parent to warrant criminal sanctions. It is an impossibility for the parent to monitor the child's every act. The outer levels of the model are where the adolescent enters his or her own domain, free from the parent's capacity to intrude or protect.[173] There, the child's actions are truly his or her own.

CONCLUSION

Parental responsibility laws symbolize the frustration of a nation which does not know how to cope with the problems of its youth. Unable to contain juvenile violence and crime, legislators have begun to fashion vaguely written laws which grant sweeping authority to police and prosecutors to intervene in the affairs of the family. While the state traditionally has been willing to impose criminal liability for such extraordinary events as severe neglect or abuse, it has never attempted to scrutinize the parent's skill at providing ordinary supervision. One of the most private and sensitive human relationships, that of parent and child, consequently has been thrown open to inspection by the criminal justice system.

The duty of parenthood no doubt includes a responsibility to guide the child's personal development. The parent's ability to supervise is by no means uniform throughout the child's life, however, as maturity and competing social forces pull the youngster farther from the parent's command. The most glaring shortcoming of parental responsibility laws has been their unwarranted assumption of parental omnipotence. Not only do they often fail to recognize varying levels of parental authority as the age of the child changes, they also assume the same degree of control no matter the nature of the child's actions or in what forum they occur. This has resulted in parents being punished not for their own acts or omissions, but for those of their children.

The problem of unconcerned parents can not be disregarded when evaluating social issues such as juvenile delinquency. The

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[173] In one highly publicized case, the Los Angeles District Attorney attempted to prosecute a mother for allowing her son to associate with an infamous youth gang. *See* Armstrong, *supra* note 23, at 8. The model presented here would forbid prosecutions of this nature, since the child's actions occur at a level where the parent has little or no control. The parent also would lack any independent interest in the gang, thus heightening the chance that vicarious liability would be imposed. To the extent that the parent failed to control the child's gang activities within the home, however, the model would allow for prosecution since the parent could be expected to exercise supervision in that setting.

public's anger at parents who are ambivalent to their children's criminal activity or abuse is justified. The response of lawmakers to constituent demands that parents who fail in their duty to care for their children be punished is understandable. These facts, however, are not sufficient justification to write legislation that bears little relation to the parent's capacity to supervise, is overly vague, and ignores principles of criminal causation. Parental responsibility laws should be tailored to correspond with narrowly conceived duties that reflect the parent's abilities. Lawmakers' recognition of a model of parental control would be a first step toward realizing this goal.